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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EWING POLLOCK AND POLLOCK, POLLOCK AND THOMAS,

Cross-Petitioners,

vs.

JAMES E. HUGHES, et al,

Petitioner-*Respondents to Cross-Petition.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION

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Questions Presented

I. **Did not the Third Circuit correctly decide that the trial court abused its discretion in ordering a new trial on damages, when the district court failed to apply the correct Pennsylvania law on damages?**

II. **Did not the first jury make a specific finding that Pollock's conduct was outrageous?**

III. **Did not the district court properly admit the opinion evidence as to value by the experts testifying for the Hughes landowners?**

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STATEMENT OF THE CASE

A review of the record below clearly shows that this cross-petition is a desperate attempt to once again re-argue the facts of the case that was argued and lost before two juries, and the Third Circuit. Petitioners (hereinafter Hughes or Hughes landowners) respectfully pray that the cross-petitioners' (hereinafter Pollock) cross-petition for a writ of certiorari be denied.

A. *Introduction*

Pollock seeks to re-argue facts to this Court after losing two jury trials and its arguments before the Third Circuit. After eleven years of injustice, Pollock wants to deny, unconstitutionally, the Hughes landowners' their Seventh Amendment rights given them by the jury in the first trial. Pollock's cross-petition presents no issue suitable for review by this Court.

The matters raised concern the law of damages in the State of Pennsylvania and the credibility of Hughes' expert witnesses which Pollock was unsuccessful in uncovering, through cross-examination, any defects it contends existed in the experts' methodology. The cross-petition should be denied because the issues were decided correctly below. The matters raised concern Pennsylvania law and the weight the jury gave to properly admitted expert testimony.

B. *Factual Statement*

The Hughes landowners incorporate the facts as stated in their Petition at pages 3-13.

In addition to those facts, the following facts, adduced at trial, contradict Pollock's arguments that Hughes experts' testimony was improperly admitted or that their methodology was improper.

Pollock's expert Julian Fine testified that the only method that could be used to determine the fair market value of the property at issue was the market data approach.[1] Fine went on to state that both the income approach and the cost depreciation approach were inappropriate (TRI, 1762-1763).[2] The market data approach was the same approach or method used by Hughes' expert Gary Bodnar.[3] Fine defined fair market value as follows:

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[1] The market data approach is the use of one, two or three comparable fair market value sales (i.e. near or in the area of the property in question) to determine the fair market value of the property involved.

[2] TRI denotes Trial Record first trial.

[3] In the second trial the Hughes landowners' experts, Gary Bodnar and Kenneth Willison, used the market data approach.

* * *

A. No. That's a little mixed up in my mind. There is fair market value under the definition of fair market value, in a shortened form, willing buyer, willing seller, neither person being under duress or necessity.
Q. And each one fully informed?

A. I forgot that part. Well-informed buyer and seller, exactly.

(TRI at 1778)

* * *

The only selling landowners who met this definition were Culp, Phillippi and Closser.[4]

Not one landowner of the over fifty involved testified on behalf of the defendants[5] that they were willing sellers, well-informed and under no duress or necessity. All of the Hughes landowners testified they were not willing, not informed, and under duress and necessity. Hughes landowners were defrauded, coerced and threatened and forced to sell by the defendants and Pollock and the jury so found.

Fine appraised and valued the Hughes landowners' properties as follows:

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[4] The Culp, Closser and Phillippi sales were the comparable arms length sales used by Hughes' expert Bodnar to determine the fair market value of the Hughes landowners' properties.

[5] The defendants as referred to hereinafter in this Brief in opposition, including Ewing Pollock and Pollock, Pollock and Thomas, are Consol Pennsylvania Coal Company; Greenon Coal Company (formerly called Rheinbraun U.S. Corporation); The Monongahela Railway Company; Consolidation Coal Company; Consol Land Development Company; Maria Theresia Bergbuagesellschaft mbH; Rheinbraun A.G., who previously filed a Petition for Writ of Certiorari at No. 91-1324, and William Reese; David Boggs; and the Upshur Agency, Inc.

Landowner	Appraised Value by Fine	Defendants Paid
Headlee (Home, 25.85 Acres)	$ 75,000	$168,000
Kent (Prime Bottom Land, 13.25 Acres)	55,000	132,500
Morris Levine Enterprises, Inc. (Junked Vehicle Land, 11.985 Acres)	12,000	80,000
Yesenosky (Home, 33.58 Acres)	35,000	67,000
Levine Iron and Metal, Inc. (Scrap Yard, 2.5 Acres)	30,000	70,000
Hughes (Home, 1.45 Acres)	20,000	90,000
McIntyre (Home, 0.423 Acres)	45,000	97,500
Loughman (50.8 Acres)	45,000	65,000
Throckmorton (Home, 111.156 Acres)	100,000	146,000

It is obvious that the fair market values assigned to each property by Fine were erroneous. Defendants paid prices well above those testified to by Fine. Defendants paid those prices even though they were fraudulently coercing the Hughes landowners by threats and outrageous conduct to sell their property. Clearly, the properties were worth much more. But for the defendants misrepresenting the circumstances surrounding Monongahela's property acquisitions, the Hughes landowners would have commanded higher prices, i.e., the prices paid to their neighbor landowners Culp, Closser and Phillippi.[6]

It is factually impossible for any landowner to be a "hold-out" when the railroad had the power to condemn. In a condemnation setting the condemnor has the power to take possession of a landowners' property immediately if the landowner refuses to sell.[7]

Also noteworthy is the fact that the compensatory awards by both juries were in some instances almost identical. For example, the award of compensatory damages for landowner Loughman was $1,450,000 (first jury) and $1,429,556 (second jury). Obviously, Pollock ignores this. As the Hughes landowners proved to two different juries, the fair market value was and is the price defendants were willing to pay to *willing and well-informed* sellers, i.e., Culp, Closser and Phillippi.

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[6] Culp was paid $75,216.00 ***per acre***, no house. Phillippi was paid $146,670.00 ***per acre***, no house. Phillippi's property was right beside landowner Headlees' property acquired by the defendants. Closser was paid $240,168.00 ***per acre***, no house.

[7] *Pennsylvania Eminent Domain Code*, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. Secs. 1-402(a) and Sec. 1-407.

One final misstatement needs to be corrected. Pollock's statement that the Hughes landowners refused remitter is false (Cross-petition at pg. 8). The trial judge directed the parties "to seek an accommodation as to the damages to be remitted in each case," it was defendants who refused to make any offer to resolve this case despite the verdict.

REASONS FOR DENYING THE CROSS-PETITION

Summary of Argument

The cross-petition should be denied. The Third Circuit correctly reinstated the first jury award.

The issues presented by Pollock are matters of well established Pennsylvania law and are of no interest in the over-all administration of federal justice. Furthermore, Pollock had ample opportunity (in two jury trials that each lasted months) to cross-examine the Hughes landowners' experts and uncover any alleged defect it contends existed in the experts' methodology.

I. *THE THIRD CIRCUIT CORRECTLY DECIDED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING A NEW TRIAL ON DAMAGES WHEN THE DISTRICT COURT FAILED TO APPLY THE CORRECT PENNSYLVANIA LAW ON DAMAGES.*

The amount of compensatory damages in this case was determined by applying the law of Pennsylvania. Any review of the record reveals that the trial court adopted an erroneous premise in its decision to grant a new trial on damages. If a decision to award a new trial is inappropriate, the correct solution is to reinstate the first verdict even when an additional theory against a defendant might be retried.[8] The Third Circuit reviewed for an abuse of discretion and reversed the district court. The Third Circuit correctly noted that under Pennsylvania law the issue was "whether the actual loss should be based on the properties use as agricultural lands or the *highest and best use as railroad rights-of-way*" and this question on the evidence was for the jury. (emphasis added).[9] Pennsylvania law provides that when a property owner faces condemnation he or she can show the property's

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[8] *Fassbinder v. Pennsylvania Railroad Co.*, 322 F.2d 859 (3d.Cir. 1963).

[9] Petition at 59a.

special and potential use as a railroad right-of-way.[10] To prove highest and best use, a condemnee must show the land is adaptable to such use and a market need exists for such a use at the time of the condemnation.[11]

Any review of the record points to a manifest abuse of discretion committed by the trial court when it granted a new trial as to damages. At the first trial of this case from each landowner there was testimony adduced as to the location of his land and its prior use. See, e.g. TRI, Ex. 137. There was testimony as to an abandoned railroad right-of-way across the property on some of the Hughes landowners land (TRI, Ex. 39). There was evidence as to the need for a railroad corridor. There was testimony as to comparable sales, i.e., to sales of property for right-of-way purposes in the vicinity of landowner's properties, and there was expert testimony from a licensed broker as to the value of the Hughes landowners' property. By and large, the jury accepted the conclusions of the Hughes landowners' expert, Mr. Bodnar.[12] The Third Circuit correctly decided that the jury's verdict on Mr. Bodnar's findings should have been accepted by the trial court.

At the first trial, Pollock and defendants tried this case as though the Hughes landowners had only residential, agricultural or light industrial properties (TRI 1766-1801). Their appraisers conceded that the comparable sales approach was the correct one. But their appraisers were unfamiliar with the properties and the area.[13] Although some evidence might have supported their position, it was rejected by the jury, and the defendants, including Pollock, offered no alternative valuations for the property. The first jury in this case was not hoodwinked by a slick presentation. It went on a view to look at the properties and the railroad.

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[10] *North Shore R.R. v. Pennsylvania Co.*, 251 Pa. 445, 96 A. 990 (1960); *Commonwealth Dept. of General Servs. v. Fake*, 45 Pa. Commw. 46, 405 A.2d 971 (1979).

[11] *Fake*, 45 Pa. Commw. at 50-51, 405 A.2d at 974. Cf., *United States v. 46,672.96 Acres of Land*, 521 F.2d 13, 15 (10th Cir. 1975).

[12] Petition at 113a.

[13] For example, Mr. Fine, who testified for the defendants and Pollock, was unfamiliar with prices paid to many of the landowners (TRI, 1782-90, 1793-94). Even the court noted credibility problems with Mr. Fine's testimony (*see*, TRI, 1785-87).

The trial court made a basic error in applying incorrect historical use and values to the Hughes landowners property.[14] The trial court's invasion of the jury's province was premised on an error of the appropriate measure of damages, governed by Pennsylvania law. The Third Circuit reviewed this abuse of discretion, and applied the correct law on the measure of damages to wit, the highest and best use as a railroad right-of-way and reinstated the first jury's award.

It is well settled that once an expert is permitted to testify, his qualifications not being challenged, the credibility of his testimony is for the jury to determine. As noted by Judge Smith, "In these cases Plaintiffs presented expert testimony concerning the fair market value of their properties which would support the jury's verdict." (Petition at A77-A79). Judge Teitelbaum's invasion of the jury's decision on the credibility of Bodnar's testimony was clearly an abuse of discretion. This has long been the law.[15]

Pollock, in its cross-petition, inaccurately states that the Third Circuit engaged in speculation when it stated that the Hughes landowners would have demanded higher prices if they knew the truth. This statement has been taken out of context. The Third Circuit clearly saw the fraud and the outrageous conduct in defendants' scheme to defraud the Hughes landowners. In context the Third Circuit stated:

> "As to fair market value, *the prices paid to the hold-outs reflect the market value.* Consol needed each and every piece of property to construct their track. Though the district court correctly characterized Closser, Culp and Phillippi as "hold-outs", it neglected to consider that plaintiffs would have demanded more money had they known what Closser, Culp and Phillippi knew - that Consol was involved and that

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[14] Just as the announcement of the construction of Disney World changed the highest and best use of the swamps around Orlando, Florida into expensive commercial property, the announcement of the construction of the Bailey Mine changed the highest and best use of the property to the only viable access route to the mine to industrial railroad right-of-way property.

[15] Certification was denied on all of these cases. See *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 89 (3rd Cir.), cert. denied, 364 U.S. 845 (196); *Bhaya v. Westinghouse Elec. Corp.*, 832 F.2d 258, 259 (3rd Cir.), cert. denied, 109 S. Ct. 782 (1989); *Bonjorno v. Kaiser Aluminum Chemical Corporation*, 752 F.2d 802 (3rd Cir. 1984), cert. denied, 477 U.S. 908 (1986).

> Monongahela could not have condemned their properties for fixed prices. But for the defendants' scheme misrepresenting the circumstances surrounding Monongahela's property acquisitions, plaintiffs would have commanded higher prices. And these prices more accurately reflect fair market value. The district court abused its discretion by discounting Bodnar's testimony and setting aside the first damage award."[16]

There was testimony at trial that the Hughes landowners had they known the truth would have held-out and demanded fair market value for their property. For example, Floyd King, attorney and negotiator for the landowners Kent and John Throckmorton said if he knew the truth "It would have enhanced my bargaining position considerably." All of the other Hughes landowners testified they would have asked higher sums or not sold at all if they knew the truth. But for the defendants' fraud in misrepresenting the circumstances of the acquisition the Hughes landowners would have demanded higher prices. The law does not speculate on what they might have asked, but gives them the fair market value. Here that value is as a railroad right-of-way across unique property being acquired after the announcement and start of construction of a one hundred million dollar coal mine with billions of dollars of coal to be mined. The first jury's verdict reflects the fair market value of the Hughes landowners' property. This Court should not permit these defendants a third attempt to try this case simply because they were dissatisfied with the amount of damages assessed them by two juries. The Third Circuit correctly decided this case.

II. *THE FIRST JURY MADE A SPECIFIC FINDING THAT POLLOCK'S CONDUCT WAS OUTRAGEOUS IN THE FIRST TRIAL.*

The second punitive damage award was correctly vacated by the Third Circuit. It is a waste of judicial resources for Pollock to argue that the second jury was improperly charged when the second jury's verdict was vacated. Pollock is asking this Supreme Court to vacate the already vacated second jury award for an alleged due process violation.

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[16] *Hughes, et al. v. Consol Pennsylvania Coal Co.*, 945 F.2d 594, at 615 (3d.Circ. 1991); Petition at 60a-61a

Pollock de-emphasizes the fact that the second trial in this case was a trial on damages only. There had already been a finding by the first jury, who heard all the evidence, that there was in fact fraud and outrageous conduct committed by these defendants.[17] The first jury was the only jury that heard all the evidence. As counsel for defendant Consol admitted and argued at the second trial as to the second jury:

> Mr. Katarincic: . . ."I want to really put on the record again, following this question from the jury, the fact that *this jury cannot determine punitive damages without having been the trier of fact with respect to the fraud because punitive builds on fraud*, ..."

(TR2, 3158) (emphasis added).

We agree the first jury was the only jury that could determine the punitive damages in this case. They heard the evidence of fraud and outrageous conduct committed by these defendants - the first jury's verdict should stand. The Third Circuit correctly vacated the second jury's verdict. The Hughes landowners cannot fathom the logic of Pollock. Pollock asks this Court to vacate what has already been vacated.

Furthermore, this record is devoid of any motion or action of these defendants to vacate the punitive damage verdict from the first trial. Erroneously in the first trial when a new trial was ordered for compensatory damages, the defendants, including Pollock, failed to motion the district court to vacate the punitive damage award. A party should not be rewarded for their procedural errors when they fail to protect the record. Because Pollock and the defendants committed this procedural error, the first jury's punitive damage verdict remains of record. The first jury's verdict was correctly reinstated by the Third Circuit.

Finally, the ratio of the *first punitive damage* award to the compensatory damage award is one to one. In *Haslip*[18] this Court accepted a four to one ratio. Clearly, the conservative Pennsylvania punitive damage guidelines do not violate any due process rights as they provided definite guidelines for the jury to follow. This Court

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[17] See Verdict Slip; Petition at 152a-161a.

[18] *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991).

should not re-write the constitutionally correct Pennsylvania standards for punitive damages. Especially in a case that produced a one to one ratio.

III. *THE DISTRICT COURT PROPERLY ADMITTED THE OPINION EVIDENCE OF THE HUGHES LANDOWNERS' EXPERTS AND DEFENDANTS HAD AMPLE OPPORTUNITY (TWO TRIALS) TO CROSS-EXAMINE THE LANDOWNERS' EXPERTS AND UNCOVER ANY ALLEGED DEFECT THEY CONTEND EXISTED IN THE EXPERTS' METHODOLOGY.*

The Federal Rules of Evidence establish a liberal policy of permitting expert testimony. At no time did Pollock or defendants challenge the qualifications of the Hughes landowners' experts as they could not.

Under Rule 702 of the Federal Rules of Evidence the introduction of expert opinion evidence is permitted when such evidence will assist the trier of fact in understanding the evidence and determining the facts in issue.[19] The admissibility of opinion evidence is within the discretion of the trial court.[20] However, the credibility of the opinion evidence is a determination for the jury, the finder of fact.[21]

The district court at both trials admitted the opinion evidence of Hughes' experts. At the second trial Judge Smith found no reason to exclude the Hughes landowners' expert witnesses' opinions. In his opinion Smith stated that the expert opinion evidence was probative and that its admission was not prejudicial to the defendants.[22] The defendants, including Pollock, never challenged the qualifications of the Hughes landowners' experts as they could not. Furthermore, there was no factual showing under Rule 703 that the data, i.e., the comparable sales of the landowners Culp, Closser, and Phillippi, was

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19 *Roe v. Deere & Co.*, 855 F.2d 151, 155 (3d.Cir. 1983).
20 *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138 (3d. Cir. 1983).
21 *Huddell v. Levin*, 537 F.2d. 726 (3d.Cir. 1976).
22 *Loughman v. Consol Pa. Coal Co., et al.*, No. 83-921, Slip op at 7-9.

not the kind of data reasonably relied upon by experts reaching conclusions in real estate market values.[23]

Pollock could not have made any factual showing because the comparable sales used by the Hughes expert included the data relied upon by experts testifying as to real estate values. The defendants' chose to ignore as comparable sales the *prices they paid* to the knowledgeable landowners. Accordingly, the expert opinion evidence of the Hughes landowners was the only such evidence that should have been admitted.

For Pollock to contend that the methodology of the Hughes landowners' experts was unusual or improper is outrageous. Experts Bodnar and Willison simply applied the market data approach and used as data several comparable fair market value sales. As the testimony, maps and photographs showed, the Culp, Closser, and Phillippi properties are and were arm's length comparable sales right next door to the property of the Hughes landowners. The same sort of comparables that the defendants' experts testified they would use.[24]

Pollock's argument goes to the weight of the evidence not the reliability, methodology or admissibility. The weight to be given an expert's opinion is a matter for the jury. Pollock is doing little more than attempting to re-argue the respective values of the expert testimony. Pollock and the defendants had two jury trials to prove that the Hughes landowners' experts' methodology was defective, and they utterly failed.[25] Justice would not be served by affording them a third attempt to attack Hughes' experts. Pollock's cross-petition should be denied.

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[23] See *Enigh v. Consolidated Rail Corp.*, 710 F.Supp. 608, 611 (W.D.Pa. 1989) a court must make a factual inquiry to determine what experts in the field find reliable and may not substitute its own views on what the court believes constitutes reasonable reliance. ACCORD, *In Re: Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 276-278 (3d.Cir. 1983) rev'd on other grounds sub nom; *Matsushita Electrical Industrial Co., Ltd., et al. v. Zenith Radio Corp.*, 475 U.S. 574 (1985) U.S. cert. den. in 481 U.S. 1029; *In Re: Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d.Cir. 1990).

[24] Testimony of Pollock's expert Donald York at second trial record pages 2480-81 and Defendants' expert Fine in the first trial at TRI 1763.

[25] Expert Willison was cross-examined for two days.

CONCLUSION

Pollock's cross-petition should be denied. The issues they raise were decided correctly by the Third Circuit.

Respectfully submitted,

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